

FILED

August 24 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0392

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN RE THE MARRIAGE OF
KAREN LYNCH STEVENS,

Petitioner and Appellee,

v.

RODNEY N. STEVENS,

Respondent and Appellant.

ORDER

Appellant Rodney N. Stevens (Stevens) seeks leave to file an out of time appeal. The Ninth Judicial District Court, Toole County, issued a Final Decree of Dissolution that distributed the property of the parties on November 26, 2008. The District Court awarded Stevens a 2003 Chevrolet truck as part of the property distribution. While there was an economic restraining order in place, Karen Lynch Stevens (Karen) and her mother, Mary Ann Kennedy (Mary Ann), caused a lien for approximately \$6,000 to be placed on the vehicle in order to pay a retainer to attorney Gale Gustafson (Gustafson) to file an appeal from the final decree. Karen transferred title to the truck to Mary Ann who secured the loan. The appeal was filed.

Gustafson withdrew from representing Karen when Karen failed to secure a surety bond to stay execution pending appeal. Karen failed to follow the Montana Rules of Appellate Procedure. This Court dismissed Karen's appeal in August of 2009.

The District Court issued three more orders directing that the truck title be transferred to Stevens. Finally, the court set two hearings on September 3, 2009, and December 17, 2009, for Karen to explain her actions. Karen testified at the hearings that she refused to transfer title to the truck to Stevens based upon instructions from her attorney, Gustafson. The District Court concluded that while Karen had violated the economic restraining order,

she had done so under the advice of counsel. The court concluded that it would be unproductive to find Karen in contempt of court and to impose a fine.

The District Court ordered Karen to clear the title to the vehicle by removing the lien held by the Shelby First State Bank on or before February 27, 2010. The court further ordered Karen to produce the certificate of title for the truck to the Toole County Sheriff's Office for delivery to Stevens's designee. In the event the lien was not removed by February 27, 2010, the court concluded that judgment in the amount of \$21,000 of funds contributed by Stevens, which were not part of the marital estate, would be entered against Karen, and the ownership of the truck would remain with Karen.

Stevens corresponded with Karen's former counsel, Gustafson, after Gustafson had withdrawn as counsel. Gustafson informed Stevens what had transpired in the District Court proceeding. Gustafson wrote Stevens a letter dated February 25, 2010, that Stevens included as an exhibit. The letter indicates that a copy also had been sent to the District Court. Gustafson explained that title to the truck had been placed solely in Karen's name to protect it from impoundment due to Stevens's DUI convictions. Gustafson denied that he had advised Karen not to turn the truck over to Stevens. He acknowledged, however, that when Karen was unable to secure a surety bond, he told Karen that he could not continue to represent her when her actions or omissions could be construed as contempt of court for failing to turn the truck over to Stevens or to secure the surety bond. Gustafson also stated, "If she had relinquished possession of the truck pending her appeal, the appeal would have been rendered moot, and subject to dismissal. If Karen elected to retain possession of this truck following my withdrawal and dismissal of her appeal she did so at her own peril."

Stevens justifies this out of time appeal on the basis that he made every attempt to remedy this case before the District Court. He states that he had to wait 60 days for the District Court to respond to his motion or it would be deemed denied. The District Court order from which Stevens is attempting to appeal is dated January 12, 2010. The certificate of service upon Stevens and Karen is dated January 13, 2010, and the certificate of authenticity is dated January 14, 2010. Stevens communicated with Karen's former counsel,

Gustafson, and made efforts to establish to the District Court that he had been defrauded by Karen and that she had forged his name on a document to the Division of Motor Vehicles.

Stevens claims that the Clerk of Supreme Court returned his materials requesting an out-of-time appeal because the documents were not served upon all parties. Stevens wrote an August 12, 2010, letter to the Clerk of the Supreme Court explaining that he is unable to serve Karen due to unwanted correspondence under prison policy. We note that Stevens included with his request that he be allowed to file an out-of-time appeal, and a copy of a memo from Montana State Prison Warden Mike Mahoney.

The Warden states in the memo that he had received communication from Karen requesting that Stevens no longer correspond with her. The Warden directed Stevens to cease all communications with Karen. The memo warned Stevens that he would be subject to a disciplinary report for disobeying a direct order. We observe that since June 15, 2010, when the memo was issued, Stevens has also been transferred from Montana State Prison to the Great Falls Prerelease Center.

We grant a request for an out-of-time appeal when it meets the prerequisites of M. R. App. P. 6. Stevens has supported his request with a statement under oath and various other documents. Based on these facts, we conclude that Stevens has established the existence of extraordinary circumstances and is entitled to proceed with an out-of-time appeal.

IT IS ORDERED:

1. That the request for an out-of-time appeal is GRANTED. Stevens shall have 15 days within which to file a notice of appeal.
2. When the notice of appeal is filed, the Clerk shall serve a copy upon Karen.

The Clerk is directed to provide a copy of this Order to Stevens and Karen, and to the Ninth Judicial District Court, Toole County, in Cause No. DR-08-005.

DATED this 24th day of August 2010.


Chief Justice

Brian Moran

John Rice

W. William Septhart

James

Justices